IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. FLOYD LEA SAXTON JR., Appellant.	No. 37108-1-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Floyd L. Saxton Jr. guilty of residential burglary and first degree malicious mischief. Saxton appeals his conviction and sentence, arguing that the State's failure to provide pretrial discovery of photographs taken at the scene violated due process. Saxton also argues that sufficient evidence does not support his first degree malicious mischief conviction because the trial court erred in admitting lay opinion evidence regarding the dollar amount of property damage at issue. Because the State's failure to provide pretrial discovery of photographs of the crime scene did not amount to a *Brady*[1] violation and sufficient evidence supports his first degree malicious mischief conviction, we affirm.

[1] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

FACTS

Background Facts

Following a previous marriage and divorce, Heather and Floyd Saxton remarried on June 3, 2004. The couple separated in May of 2006. After they separated, Heather[2] continued living at 1101 East 54th Street in Tacoma, Washington, while Floyd moved out. Floyd took all of his personal property except some clothing and boxes of papers. After Floyd moved out, Heather changed the locks and did not give Floyd a key, nor did she give him permission to enter the home. During their separation, the couple's two minor children resided with each parent on alternating weeks.

On the morning of June 29, 2006, Floyd was preparing to assist his mother, Jeanette James, with her move from Washington to Kansas. Floyd testified at trial that on June 29, he drove his red Trans Am with a black convertible top to his mother's apartment at 3101 East D Street in Tacoma at 10:30 or 11:00 am, but he later changed his testimony, stating he arrived at his mother's house at 1:00 pm. That same morning, Heather left her house clean and in order, locking all the doors. Heather and a co-worker drove to James's home to serve Floyd with divorce papers and a restraining order. James's residence was located approximately three miles from Heather's house and took about eight to nine minutes to reach by car. Between 2:00 and 2:30 pm, Heather's co-worker served Floyd with the divorce papers while Heather waited in the car. After serving Floyd with the divorce papers, Heather picked up her children from a friend's home and checked into a hotel to avoid any potential confrontation with Floyd.

Floyd was not aware that Heather was seeking a divorce and had expected that she and

[2] We use Heather and Floyd's first names for clarity.

the children would be accompanying him on the trip to Kansas. Despite having talked with Floyd twice earlier that morning, Heather did not mention that she was seeking a divorce and that she and the children would not be traveling with him to Kansas. Floyd was "very surprised" to be served with the divorce papers and a restraining order. 5 Report of Proceedings (RP) at 343.

On June 29, 2006, at approximately 2:30 pm, Douglas Byrn saw what he later described as a red Camaro with a black convertible top parked in front of Heather's house. Byrn saw a black male get out of the car and walk to Heather's house. Byrn noticed that the man was carrying a "yellow-handled tool" and was "moving with a purpose." 3 RP at 33. Byrn did not know who was living at the 1101 East 54th Street house and had never met the Saxtons.

At 3:18 pm, a security company called the Tacoma Police Department to inform them that the alarm at Heather's home went off. Officers Reginald Gutierrez and Young Song arrived at the home shortly after 4:14 pm. After receiving no answer at the front door, Gutierrez and Song entered the house through a broken sliding window and did a walk through. The officers did not find anybody inside the home.

Officer Gutierrez noted that the house was "completely trashed." 3 RP at 47. Every room of the house was damaged except for the children's bedrooms. There were large holes in the walls that appeared to be produced by a crowbar or tire iron. Furniture was destroyed and "thrown all over the house." 3 RP at 47. There were broken windows and mirrors. Water was left running in the kitchen, bathrooms, and the laundry room. The basement floor was wet from the overflowing water and the basement door was off its hinges. The master bedroom door was also off its hinges, jewelry racks were broken, and jewelry and clothes were scattered across the bedroom floor. All of the bathrooms were damaged; there were broken vanities, broken mirrors,

and a shattered glass shower door. There was also significant damage to the kitchen. The refrigerator was knocked over onto the range and the refrigerator door was removed. Kitchen drawers were removed and broken. The front panel of the oven was ripped off with the insulation exposed and the microwave was "smashed." 4 RP at 172. The officers noticed a burning smell, saw that one of the oven's range tops was on, and called the Tacoma Fire Department. Officers also saw a burnt bible either on the burner or next to it. Nothing from the house was missing or stolen and none of the children's or Floyd's personal property was damaged.

On June 29, 2006, forensic specialist Toni Martin came to Heather's house to photograph the damage and process the scene for latent fingerprints. Martin was unable to recover any latent fingerprints.

On June 30, 2006, Heather returned to her house, discovered the break-in, and called the police. Heather did not notice any blood spatter in the home on this date. Because of the damage to the house, Heather and her children continued staying at a hotel. Heather and her co-worker, Verna Thomas, returned to the house the following Monday, July 3, 2006, and Thomas noticed blood on the wall next to one of the holes. Heather and Thomas returned to work and Heather called the detective on the case to inform her about the blood.

On July 20, 2006, Tacoma Police Detective Christine Coulter went to Heather's house to investigate. Coulter saw that "blood spatter was in the very areas where a crowbar or a hammer, some tool with a claw, had been used to rip at the walls and tear them down." 4 RP at 242. She also saw blood spatter on a ceiling light and believed this occurred when someone raised a crowbar to destroy the walls. That same day, Tacoma Police Forensic Services Supervisor, Mary Lally, went to Heather's home to take photographs and to collect samples from the suspected

blood spatter. Lally collected four suspected blood swabs and a control swab. She photographed suspected blood on top of the washing machine, the east dining room wall, the east living room wall, and the south living room wall. Lally noted that the blood spatters were located within a foot or less of the damaged areas.

James Currie, a forensic scientist from the Washington State Patrol Crime Lab, analyzed the swabs and a blood sample taken from Floyd. Currie found that all four swabs matched Floyd's blood sample. Currie testified at trial that the chance of another person's deoxyribonucleic acid (DNA) coming up with the same profile is one in 4.7 quintillion.

Procedural Facts

On July 24, 2006, Pierce County charged Floyd with residential burglary, contrary to RCW 9A.52.025, and first degree malicious mischief, contrary to RCW 9A.48.070(1)(a). A jury trial began on October 25, 2007.

At trial, Officer Gutierrez testified that, in his opinion, the damage to the house exceeded $50,000 and it would take two people more than an hour to cause that much damage. Later, over defense objection, Heather testified that, based on insurance company estimates, she believed damage to the structure was $11,000, and the damage to her personal property was $4,000. Defense counsel later renewed his objection:

> [Defense counsel]: Your Honor, I was going to ask the Court to reconsider the Court's denial of my objection to hearsay in the context of the victim witness repeating the estimate of the insurance company.
>
> THE COURT: Well, let me tell you about that. All you have to do with that, a homeowner or owner of the property is always able to testify with reference to the value of the property or the value of their damage from their own wisdom, their own experience. And you objected that she said that she was told by the insurance people they estimated the damage to be $11,000, I think it was.
>
> [Defense counsel]: Yes, Your Honor.
>
> THE COURT: And in my mind, she listened to that; she knows her

> property and what was destroyed, and she says she thought it was $11,000. That was one factor that she used in coming up with that estimate, is what it amounted to, so I didn't think that it was prejudicial to let her testify to what she thought the value was, based upon the information that she was privy to, and including the insurance people, which was an estimate. Nobody has any document of any description, do they? And so that's why I did that.
>
> [Defense counsel]: Okay. I believe she could testify, as Your Honor has considered, about her lay person's opinion.

4 RP at 218-19. On the third day of trial, November 1, 2007, the following colloquy took place:

> [State]: . . . I intended and had Toni Martin, the forensics specialist, waiting to testify all morning regarding the photographs she took. During the recess I took out the photographs we've had marked 1 through 9 just to go over those with her and her comment to me was, "These are not my photographs.". these were taken by -- I believe this was Taylor. I showed her those photographs and she handed me another set of photographs that I have not seen before --
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> [Defense counsel]: I have not seen them.
>
> [State]: -- and defense has not seen before, either.

3 RP at 66. After a recess, the parties continued to discuss evidentiary matters outside the presence of the jury.

> [Defense counsel]: . . . The State has provided us with some photos, new photos here, and we have a witness here to testify to one set of photos. My concern really isn't about that first set, my concern is about the other set of photos that we didn't receive ahead of time but were taken by a person who is going to testify, I believe today, a witness Toni Martin --
>
> [State]: Mary Lally, actually.
>
> [Defense counsel]: -- Mary Lally -- I keep switching it -- who is going to testify later about a set of photographs that were taken on the 20th of July, which would be 21 days after the incident in question. My concern is, absent foundation of any kind to control of the scene, that those photographs which are now 21 days after the alleged incident are not representative of much of anything at this point. . . . I wanted the Court to know that we may need to address that before the witness takes the stand.

3 RP at 68-69. Forensic specialist Martin testified regarding her June 29, 2006 photographs, and the trial court admitted the photographs, exhibits 13 through 33, without objection. Later that same day, defense counsel raised an issue regarding Lally's photographs.

> [Defense counsel]: We have his photographs, and I had a chance to speak to Ms. Lally very briefly. The set of photographs we had before we thought were the ones from you. Now we have a new set of photographs we just got this afternoon, the ones you brought earlier. All those were new. And then we have another set that was new that the concerns were about, were taken by Ms. Lally, according to speaking to her and according to her, on July 20th, so 29 days after these photographs were taken of the scene.

3 RP at 117-18. The trial court later admitted the Lally photographs, exhibits 34 through 42, without objection.

The jury found Floyd guilty of residential burglary and first degree malicious mischief. The trial court sentenced Floyd to six months incarceration, the bottom of the standard range, followed by twelve months of community custody.

ANALYSIS

Brady Violation

Floyd first argues that the State violated *Brady*, when it failed to provide the Martin and Lally photographs during pretrial discovery, depriving him of his due process right to prepare a defense. The State counters that it provided defense counsel with the Martin photographs during pretrial discovery. The State also argues that its failure to provide defense counsel with the Lally photographs did not amount to a *Brady* violation because (1) the Lally photographs are not exculpatory, impeaching, or otherwise favorable to Floyd; (2) the photographs were not in the State's possession until the day Lally was set to testify and, upon receiving the photographs, the State immediately notified defense counsel and the trial court; and (3) Floyd cannot demonstrate that he was prejudiced by the Lally photographs. Although the record shows that the State failed to provide both the Martin photographs and the Lally photographs during pretrial discovery, the State did not commit a *Brady* violation because neither set of photographs were exculpatory,

impeaching, or otherwise helpful to Floyd's defense, and the State's failure to provide the photographs before trial did not prejudice Floyd.

In *Brady*, the Supreme Court held that a prosecutor's suppression of an accomplice's confession to murder violated the defendant's due process rights under the Fourteenth Amendment. 373 U.S. 83. In holding that the prosecution deprived the defendant of due process, the Supreme Court announced the rule that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87.

There are three components to a *Brady* violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be material, meaning that the evidence must have resulted in prejudice to the accused. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). Prejudice occurs "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Strickler*, 527 U.S. at 280 (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)). Prejudice is determined by analyzing the evidence withheld in light of the entire record. *In re Pers. Restraint of Sherwood*, 118 Wn. App. 267, 270, 76 P.3d 269 (2003) (citing *Benn v. Lambert*, 283 F.3d 1040, 1053 (9th Cir.), *cert denied*, 537 U.S. 942 (2002)). While a prosecutor has no duty to independently search for exculpatory evidence, the prosecutor has a duty to learn of evidence favorable to the defendant that is known to others acting on behalf of the government in a

particular case, including the police. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 399, 972 P.2d 1250 (1999); *In re Pers. Restraint of Brennan*, 117 Wn. App. 797, 804, 72 P.3d 182 (2003) (citing *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)). Finally, "'[a] *Brady* violation does not arise if the defendant, using reasonable diligence, could have obtained the information' at issue." *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 916, 952 P.2d 116 (1998) (quoting *Williams v. Scott*, 35 F.3d 159, 163 (5th Cir. 1994), *cert. denied*, 513 U.S. 1137 (1995)).

Generally, we review a trial court's decision in dealing with violations of a discovery order for manifest abuse of discretion. CrR 4.7; *State v. Smith*, 67 Wn. App. 847, 851-52, 841 P.2d 65 (1992) (citing *State v. Laureano*, 101 Wn.2d 745, 762, 682 P.2d 889 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988)), *review denied*, 121 Wn.2d 1019 (1993). But we review an alleged due process violation de novo. *State v. Autrey*, 136 Wn. App. 460, 467, 150 P.3d 580 (2006).

As an initial matter, the parties dispute whether the State provided defense counsel with the Martin photographs during pretrial discovery. The State concedes that it did not provide defense counsel with the Lally photographs until the day that Lally was set to testify. Here the record shows that the State also failed to provide defense counsel with the Martin photographs during pretrial discovery. On the third day of trial, the State informed the court that it spoke with Martin about photographs that the State thought Martin took of the crime scene. But Martin told the State that "[they were] not [her] photographs" and Martin handed the State a set of photographs that neither the State nor defense counsel had seen before. 3 RP at 66. The State then provided defense counsel with the Martin photographs at issue. Martin later testified

regarding her photographs of the scene taken on June 29, 2006, and the trial court admitted her photographs, exhibits 13 through 33, without objection.

Although the record shows that the State failed to provide both the Martin and Lally photographs to the defense counsel before trial, the State's failure does not rise to the level of a *Brady* violation.

First, Floyd cannot meet the first prong of the *Brady* test, that the evidence was favorable to him because it was exculpatory or impeaching. The Lally photographs were not exculpatory because they depicted blood spatter found in the home, which was later tested and confirmed to be Floyd's blood. Floyd argues that the Martin photographs and the Lally photographs, when taken together, constitute irreconcilably conflicting evidence because the Martin photographs show the absence of blood spatter and, thus, conflict with the later photographs depicting blood spatter. Although irreconcilable conflicts in the physical evidence are exculpatory and undermine a guilty verdict, the Martin and Lally photographs do not show such a conflict. *See State v. Hundley*, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995) (sufficient evidence does not support a conviction for possession of a controlled substance where lab testing conflicted on issue of whether the subject matter tested positive for controlled substance). The Martin photographs do not clearly show the absence of blood spatter; they were taken at a distance to show the general damages to various rooms in Heather's home and, contrary to Floyd's claim, do not clearly indicate that blood spatter was absent on that date. The Lally photographs, in contrast, are close-up photos of the blood spatter. Because the Martin and Lally photographs do not irreconcilably conflict and are not otherwise exculpatory or impeaching, Floyd fails to meet the first prong of the *Brady* test.

Next, even if Floyd could show that the photographs were exculpatory or impeaching, he cannot meet the third prong of the *Brady* test, that he was prejudiced by the State's failure to provide the evidence. Specifically, Floyd cannot show that there is a reasonable probability that had the evidence been disclosed before trial, the result of his proceeding would have been different. Here, the State presented substantial evidence of Floyd's guilt that was not diminished by Floyd's untimely receipt of the photographic evidence. Heather's house was ransacked shortly after Floyd was served with divorce papers. An eyewitness saw a black male park a red sports car with a black convertible top near Heather's house and watched as the man "mov[ed] with a purpose" towards the house while carrying a tool. 3 RP at 33. There was extensive damage to all rooms of the house except for the children's rooms. And spatters of Floyd's blood were found near the damage to the walls. More importantly, upon learning of the State's failure to provide defense counsel with the photographs during discovery, the trial court recessed for three days to provide defense counsel with time to review the evidence. And defense counsel did not pose any objections when the trial court admitted the photographs.[3]

Accordingly, we find that the State did not commit a *Brady* violation and that the delay in turning over the photographs was cured by the trial court's three-day recess to allow defense counsel to review the evidence.

Sufficiency of the Evidence

[3] Even assuming that Floyd could meet the three prongs of a *Brady* violation, "'[a] *Brady* violation does not arise if the defendant, using reasonable diligence, could have obtained the information' at issue." *In re Benn*, 134 Wn.2d at 916 (quoting *Williams*, 35 F.3d at 163). Here, on August 16, 2007, more than two months before the start of trial, the State provided defense counsel with a witness list that included both Martin and Lally as State's witnesses. Any attorney using due diligence could have interviewed Martin and Lally before trial and discover the existence of crime scene photographs.

Next, Floyd argues that sufficient evidence does not support his first degree malicious mischief conviction because the trial court erred when it admitted (1) Officer Gutierrez's testimony that he estimated the amount of damages to Heather's house to exceed $50,000; and (2) Heather's testimony, based on insurance estimates, that the damage to her house was $11,000 and damage to her personal property was $4,000. Floyd argues that both Guitierrez's and Heather's testimony were inadmissible lay opinion under ER 701. Floyd also argues that Heather's testimony was inadmissible hearsay and violated the Sixth Amendment's confrontation clause. Last, Floyd argues that, while the Martin photographs are substantial evidence that Heather's house was damaged, they do not give the jury a basis by which to put a dollar value on the damage.

Sufficiency of the evidence is a question of constitutional magnitude that a defendant may raise for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). In determining whether sufficient evidence supports a conviction, "[t]he standard of review is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt." *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990) (citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). We do not have to be convinced of the defendant's guilt beyond a reasonable doubt, only that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107, *review denied,* 141 Wn.2d 1023 (2000).

A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable for purposes of drawing

inferences. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact's resolution of conflicting testimony and evaluation of the persuasiveness of the evidence. *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997) (citing *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992)). In other words, credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

To convict Floyd of first degree malicious mischief, the State had to prove that Floyd (1) knowingly and maliciously (2) caused physical damage to the property of another (3) in an amount exceeding $1,500. RCW 9A.48.070(1)(a). Floyd challenges only the third element, that the amount of damages exceeded $1,500. RCW 9A.48.100(1) states, "'Physical damage', in addition to its ordinary meaning . . . also includes any diminution in the value of any property as the consequences of an act." Here, three pieces of evidence potentially support the jury's finding that the damage to Heather's home exceeded $1,500. We address each piece of evidence in turn.

A. Officer Gutierrez's testimony

At trial, the State asked Officer Gutierrez, "What would you estimate the damage to this house to be?" 3 RP at 51. Gutierrez responded, "Better than $50,000." 3 RP at 51. Defense counsel did not object. Floyd acknowledges our Supreme Court's decision in *State v. Coria*, 146 Wn.2d 631, 48 P.3d 980 (2002), that similarly dealt with a sufficiency claim in the context of a police officer's testimony as to the amount of damage in a second degree malicious mischief conviction. In *Coria*, the defendant claimed that the State did not lay any foundation for the officer's expertise for how she arrived at her damage estimate of $620. 146 Wn.2d at 639. But our Supreme Court held that Coria waived his objection to the officer's testimony regarding the

amount of damages because he did not object to this evidence at trial. *Coria*, 146 Wn.2d at 641.

Floyd attempts to distinguish *Coria* by arguing that the officer's valuation of damage for $620 in *Coria* "indicates a thoughtful appraisal of specific substantive facts . . . [whereas] [Officer] Gutierrez's estimate [of $50,000], by contrast, was sheer guesswork." Br. of Appellant at 18. But our Supreme Court did not address whether the officer's estimate of $620 was thoughtful appraisal of specific substantive facts or sheer guesswork because Coria waived his objection by failing to object below. We similarly do not address Floyd's claim that Gutierrez's testimony concerning the amount of damages to Heather's home exceeded $50,000 because Floyd failed to object to this evidence at trial. Accordingly, Gutierrez's testimony constitutes sufficient evidence from which a jury could find that the damage to Heather's property exceeded $1,500 and, thus, supports a first degree malicious mischief conviction.

B. Heather's Testimony

Next, Floyd argues that Heather's testimony that damage to her home, based on insurance estimates, was $11,000 and damage to her personal property was $4,000 was inadmissible lay opinion under ER 701, inadmissible hearsay, and violated Floyd's right to confrontation under the Sixth Amendment.

The State asked Heather the following at trial:

> [State]: Did you ever at least get estimates to repair the damage?
> [Heather]: We got estimates through the insurance company. The damage --
> [Defense counsel]: Objection; hearsay.
> THE COURT: Overruled.
> [Heather]: The damage to the property itself, the structure, was right around $11,000.
> [Defense counsel]: Objection, Your Honor.
> THE COURT: Overruled.
> [Heather]: It was right around $11,000, and then the damage to my personal belongings was around $4,000.

4 RP at 203-04. Later, during recess and out of the presence of the jury, defense counsel renewed his objection. The trial court again overruled the objection, finding that the insurance estimate was merely one factor that Heather used in coming up with the damage estimate and that the owner of property can testify as to the property's value. The trial court also stated that it would allow defense counsel to cross-examine Heather about how she arrived at the damage figure for more extensive foundation, but defense counsel declined to make that inquiry.

Floyd first argues that the trial court erred in admitting Heather's testimony because it constituted inadmissible lay opinion evidence under ER 701. Floyd acknowledges our opinion in *State v. Wilson*, 6 Wn. App. 443, 446, 493 P.2d 1252 (1972), which recognized that a property owner may offer her opinion of the market value of her own property. But Floyd argues that Heather's testimony is not covered by this rule because she testified about the amount of damages to her property, the amount by which the market value of her property was diminished.

A lay witness may give only "those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702." ER 701. A property owner may testify as to the property's market value without being qualified as an expert in this regard. *State v. Hammond*, 6 Wn. App. 459, 461, 493 P.2d 1249 (1972) (citing *McCurdy v. Union Pac. R.R.*, 68 Wn.2d 457, 413 P.2d 617 (1966)).

Here, although Heather did not testify about the market value of her property but instead testified about the amount by which the market value of her property was diminished, her

testimony nonetheless falls within the scope of permissible lay opinion under ER 701. Heather's opinion, that the combined damage to her house and personal property amounted to $15,000, was rationally based on her perception because, as the property owner, she presumably was in the best position to know the property's value before it was damaged. *See Hammond*, 6 Wn. App. at 461 ("The owner of property is presumed to be familiar with its value by reason of inquiries, comparisons, purchases and sales."). Heather could then base her estimate of the property's diminution in value based upon her observations of the damage to the home and her personal property, without needing any scientific, technical, or other specialized knowledge.

But Heather did not rely purely on her own observations of the damage to her home and personal property to form her opinion that the total damage amounted to $15,000; she also based this estimate on her recollection of insurance estimates of the damage. Floyd argues that this basis of her opinion constitutes impermissible hearsay and violates his right to confrontation under the Sixth Amendment.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Heather's testimony regarding the insurance estimates was hearsay because she offered it to prove the truth of the matter asserted. But as the trial court correctly observed, the insurance estimate was merely one factor that Heather used to form the basis of her opinion as to the damage to the house and property. Heather testified that she obtained estimates through the insurance company and then she testified that, "The damage to the property itself, the structure, was right around $11,000 . . . and then the damage to my personal belongings was around $4,000." 4 RP at 203-04. Heather did not expressly relay what the insurance company estimated her property damage

to be. More important, Heather was subject to cross-examination to bring out the basis or lack of basis for her estimate, but defense counsel chose not to pursue that line of questioning. Accordingly, Floyd's confrontation rights were not denied. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The insurance estimate was never admitted, nor was it even offered, as evidence in this case.

Heather's testimony regarding the insurance company's estimate of the property damage was objectionable hearsay that the trial court should have excluded, but in light of the photographs, any error in admitting that portion of her testimony was clearly harmless. *See State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (evidentiary error is grounds for reversal only if it results in prejudice, meaning within reasonable probabilities, the outcome of the trial would have been different had the error not occurred). Here, (1) Officer Gutierrez's unobjected testimony regarding the amount of damages, (2) testimony describing the extensive damage to the property, and (3) the crime scene photographs constitute overwhelming evidence that established property damage in excess of $1,500. Accordingly, Floyd's first degree malicious mischief conviction stands.

On learning of the multiple photographs and the confusion over which witness took which photos, the prosecutor immediately provided copies of all photos to the defense and the trial court recessed the trial to give the defense sufficient opportunity to prepare. Accordingly, even if the photos were beneficial to the defendant's presentation of a defense, which they were not, the delay did not prejudice Floyd. And because those photos, together with the victim's testimony, overwhelmingly establish that the damage exceeded $1,500, we affirm.

A majority of the panel having determined that this opinion will not be printed in the

Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

VAN DEREN, C.J.

PENOYAR, J.